No. 3043

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

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THE AMERICAN STEAMSHIP "COLUSA", her boilers, engines, tackle, apparel and other furniture and GRACE STEAMSHIP COMPANY (a corporation),

*Appellants,*

vs.

GEORGE I. DUNWOODY,

*Appellee.*

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## BRIEF FOR APPELLANTS.

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**Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.**

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GOODFELLOW, EELLS, MOORE & ORRICK,
*Proctors for Appellants.*

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*Filed this.....day of October, 1917.*

*FRANK D. MONCKTON, Clerk.*

*By.....Deputy Clerk.*

PERNAU PUBLISHING COMPANY

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### NATURE OF APPEAL.

This is an appeal from a final decree in favor of the libelant and against the steamship "Colusa" and the Grace Steamship Company, a corporation, in the sum of $1500.00 and costs. The libel grows out of a personal injury sustained by George I. Dunwoody, a seaman on the "Colusa", alleged to have been caused through the negligence of the

libelants in supplying to him a defective working appliance, to wit: a defective turnbuckle.

The libelants answered, denying that the turnbuckle was defective or unfit for the purpose for which it was being used, and setting up as additional defenses that of assumption of risk, contributory negligence, and negligence of a fellow-servant. The answer appears at folio 13, page 15 of the Apostles, and an amendment thereto at page 21 of the Apostles, folios 19 et seq.

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POINTS ARGUED ON APPEAL.

The appellants complain of the decree entered by the District Court in this:

1. The evidence fails to show any negligence upon the part of the appellants or either of them.
2. The evidence fails to show that the "Colusa" was in any respect unseaworthy.
3. The evidence fails to show in any manner how the unseaworthiness of the "Colusa" complained of contributed to the accident.
4. That the negligence, if any, relied upon was that of a fellow-servant of the libelant.
5. That the court erred in allowing the deposition of the witness Hugo Dallman to be read in evidence.
6. That the risk of injury in this connection was one assumed by the seaman.

FACTS IN BRIEF.

The "Colusa" on September 24, 1916, was leaving the port of Parita, Peru, the anchor having just been heaved, when George I. Dunwoody, the libelant, was instructed by the chief mate, one Bergsten, to set up the deck lashings, for the purpose of securing a deckload of lumber, which composed a portion of the cargo. These deck lashings are composed of two chains with one end fastened to each side of the ship. The chains are brought together in the center of the ship on top of the deck load and fastened together by an appliance called a turnbuckle. This appliance is a rod about 5 feet long, one end of which is fastened permanently to one of the deck lashing chains, and on the other end there is a hinged hook in which the other deck chain is placed, which hook is then prevented from opening by means of a slip-link which is placed around the shank of the hook and over the end of the hinged portion. When this hook and link are placed in position the deck lashings are then drawn taut or cinched up on the deckload by turning the rod in the middle of the turnbuckle. This rod is threaded at each end and as it is turned by means of a monkey wrench the ends of the chains are drawn together until they tightly secure the deckload to the ship. This turnscrew device therefore, works on about the same principle as an ordinary vise.

Although as we propose hereafter to show that this was a standard turnbuckle, and good seaman-

ship required no further means for the holding of the slip-link upon the hook than the pressure applied through the vise (the security of the link increasing in proportion to the force brought to bear by the vise screws) for the better safeguarding of the welfare of the sailors, the turnbuckles on the "Colusa" had had a hole bored in the outer or hinged end of the hook (this being referred to in the record as the pelican hook) in which a nail was inserted after the slip-link was in place to prevent the possibility of the link slipping off the end of the hook and thus unloosening the turnbuckle. This hole and nail were really unnecessary for the operation of the turnbuckle, and only an added precaution, as is shown by the testimony of the witness Harry Stremmel, a man of 19 years' experience at sea. He testified on pages 127 and 128 of the record concerning the appliance in question as follows:

> "Q. For about how many years have you had to do with ships?
>
> A. 19 years.
>
> Q. From your observation of the appliances on the 'Colusa', can you state whether or not they are standard, particularly with reference to the type of turnbuckle used there?
>
> A. Well, in my judgment they are standard.
>
> Q. Is there more than one type of turnbuckle used on ships?
>
> A. Well, there may be; they are not all exactly alike. There may be minor little differences in the construction of a turnbuckle.
>
> Q. Do you recall that you used any of this type of turnbuckle that has a hole through the

end for the pin that the link slips over so as to hold the link from slipping off?

A. I cannot remember whether I ever saw a hole in the end of the pin.

Q. The ones you saw, you never remember of seeing that hole used at all; is that the idea?

A. No.

Q. What holds the link on?

A. The strain on the turnbuckle holds the link on.

Q. As I understand you, then, when the turnbuckle is screwed up and the strain comes onto the pelican hook, it, of itself, holds the link on?

A. The more strain you get on the chain, on the turnbuckle, the tighter the ring is on.

Q. How is the link kept on until you get the strain on the turnbuckle?

A. It is slipped on and then the turnbuckle is set up.

Q. What is there to prevent its slipping off while you are setting up the turnbuckle?

A. Nothing at all.

Q. How about the man who is turning it up, can he see if it is slipping off?

A. Yes, if he is watching the ring he can see if it is slipping I suppose.

* * * * * * *

Q. That is what I am getting at. While you are tightening up the chain, is it necessary for a man to pay any attention to the link to see whether it slips, or not?

A. We never pay attention to it at all; my men always set up the chain without using any pins, or anything like that. I don't know what they do after they leave port."

On the day of the accident the libelant was in the act of tightening up a turnbuckle on No. 1 hatch, when something occurred, the record being silent as to what actually did take place, and the seaman

fell off the deckload and into the hatch, sustaining a broken arm and sprained ankle.

The libel proceeds on the theory that the nail which was placed in the hole of the pelican hook was an improper appliance to be used for that purpose, and that this nail fell out of the hole, thereby causing the link to slip off and the hook to fly open, thus injuring libelant.

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IMPORTANCE OF VIEWING TURNBUCKLE.

At the time of the trial of this cause the "Colusa" was at sea, and the turnbuckle in question could not be produced. Upon her next landing at this harbor a turnbuckle of the exact type and character of this one, perhaps the same one, as they are all similar, was removed from the vessel, and an effort was made to submit it for the inspection of this court by way of additional proof. This application was denied, without prejudice to its renewal at the time of hearing. From what has gone before, the *imperative necessity* of having this court view the appliance becomes apparent, and it is submitted that for a clear understanding of the issues here involved, the court should permit the introduction of this turnbuckle in evidence at the time of hearing.

THE COURT ERRED IN ADMITTING THE DEPOSITION OF WITNESS DALLMAN.

For the more orderly presentation of our argument, we first take up the fifth point upon which the appellants predicate prejudicial error, as outside of the questionable testimony of the witness Dallman, the record is entirely devoid of any showing of negligence upon the part of the appellants. The objections to the introduction of this deposition are included in Specifications numbered 18, 19 and 20. *By some oversight the clerk, in preparing the transcript failed to include therein the specifications of error, but we have his assurance that the same will be printed and before the court at the time of this hearing.*

The deposition *de bene esse* of Hugo Dallman, the boatswain of the "Colusa", at the time of the accident, was taken in San Francisco, on December 29, 1916, on behalf of the libelant. No grounds for the taking of this deposition are assigned, as it appears that the witness was then, and at the time of trial, a resident of, and at both times actually in, San Francisco. At the taking of the deposition all *objections to the materiality and competency of the testimony was reserved by the parties* (~~folio 627~~) (page 70, 71)

This deposition was presumably taken under authority of Section 863, Revised Statutes, under the supposition that the witness, being a sailor might leave the jurisdiction.

At the time of the taking of the deposition it was clearly the intention of the parties to have Dallman present at the trial in the event he was within the jurisdiction. This is clearly shown by the portion of the deposition appearing at page 89 of the Apostles as follows:

"A. I have got relatives here in 'Frisco, if you would like to know that.

Q. Where is that?

A. They live on Sixteenth Avenue.

Q. What number?

A. 466.

Q. Do you expect to leave San Francisco?

A. No.

Q. How long do you expect to remain here?

A. I expect to take out my license pretty soon; I don't have to remain here forever. (76)

Q. You expect to take out your license pretty soon?

A. Yes.

Q. How long will that keep you here?

A. I will get my citizen's papers in four or five months; it will take me at least three or four months to go to school.

Q. You will be here for seven or eight months?

A. I will not leave for the next year.

Q. You will be here for the next year?

A. I might take a ship again, go to sea, you know.

Q. What I was getting at is, so that I could get information of how to locate you in case this matter could come on for trial. I would like very much to have you as a witness in court and have you explain that turnbuckle to the court."

The introduction of the deposition was properly objected to at the trial in the following language at pages 118 and 119:

> "Mr. Ford. Now, your Honor, as to the depositions,—as to the deposition of the one I mentioned, first, Carl Pfautsch, there is no objection to that deposition. As to the deposition of Dallman, which was taken on the 29th day of December, 1916, we do object to its use for the following reasons: First, that there is no showing made that the witness is absent from the jurisdiction of this court; second, that it appears from the face of the deposition, from the conversation between counsel, that it was expected that this particular witness would be produced personally if he was not at sea at the time the trial came on. I have not had an opportunity personally to look over the deposition, but my recollection is very clear on the matter that on cross-examination I pointed out to the witness and to Mr. Wall both that as (100) to this particular witness we desired him in court. I presume there is no dispute between Mr. Wall and myself but that the witness is in town today.
>
> Mr. Wall. I don't know whether he is in town, or not; I don't think it makes any difference."

The court overruled the objection and the deposition was read into the record. This was clearly error for the reason that the whole deposition was incompetent if the witness was available at the time of trial, and the burden of showing the competency of the deposition was on the libelant.

In making the ruling the trial court entirely disregarded Section 865, Revised Statutes, which is as follows:

> "Every deposition taken under the two preceding sections shall be retained by the magistrate taking it, until he delivers it with his own hand into the court for which it is taken; or it shall, together with a certificate of the reasons as aforesaid of taking it and of the notice, if any, given to the adverse party, be by him sealed up and directed to such court, and remain under his seal until opened in court. *But unless it appears to the satisfaction of the court that the witness is then dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting,* or that, by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court, *such deposition shall not be used in the cause.*"

No showing of any kind was made or attempted to be made that the witness was not available, in fact the court seemed to be guided by libelant's counsel's remark "I don't think it makes any difference". It is well established that prior to the admission of a deposition of this kind, it is incumbent upon the party offering the same to first prove its competency. Thus in *The Patapsco Insurance Co. v. Southgate et al.,* 5 Peters (U. S.) 604, it is said:

> "In all these cases, except where the witness lives at a greater distance than one hundred miles, it will be incumbent on the party for whom the deposition is taken, to show at the trial that the disability of the witness to attend personally continues, the disability being sup-

> posed temporary, and the only impediment to a compulsory attendance. The act declares expressly that, unless the same (that is, the disability) shall be made to appear on the trial, such deposition shall not be admitted or used in the cause. This inhibition does not extend to the deposition of a witness living at a greater distance from the place of trial than one hundred miles, he being considered permanently beyond a compulsory attendance. The deposition in such case may not always be absolute, for the party against whom it is to be used may prove the witness has removed within the reach of a subpoena after the deposition was taken; and if that fact was known to the party, he would be bound to procure his personal attendance. The *onus,* however, of proving this, would rest upon the party opposing the admission of the deposition in evidence."

This case is decided on sound legal principles and merely follows the unmistakable wording of the statute.

Effort will be made to show that appellants stipulated to the introduction and reading of this deposition in any case, but an examination of the stipulation (pages 70 and 71, Apostles) clearly shows that a reservation was made with respect to the competency of the testimony, and that it could only be read in the event a sufficient showing for its introduction at all was made. *The very apparent error of the trial court in this regard was highly prejudicial in view of the fact that without the deposition of Dallman in the record, no possible showing of negligence has been made.* Dallman's deposition must be deemed out of this case. The

proof that Dallman was within the jurisdiction of the court, was contained in his deposition itself.

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THE EVIDENCE FAILS TO SHOW ANY NEGLIGENCE UPON THE PART OF THE APPELLANTS OF ANY UNSEAWORTHINESS OF THE "COLUSA".

Turning now to the other points urged in support of the appeal in the order heretofore outlined. This record fails to show any condition of the vessel or its appliances in an unseaworthy condition, and the record further fails to show how the accident happened or what caused the same.

All told, four members of the crew testified, three by deposition, and the libelant. *No one actually saw the accident.* The three members of the crew aside from the libelant were near at hand, but did not see the actual occurrence.

John Bergsten, the mate, under whose direction this work was being done, did not see the accident. He testified as follows at page 29 of the Apostles:

> "Dunwoody was setting up this chain lashing, under my directions there,—I was standing on the chain on the port side, and he was behind me about fifteen feet; he was using—he had to use, to get the power to set this turnbuckle,—he had to use a key wrench, or pipe wrench, as we call it, about thirty-six inches long, to get the weight off the deckload; he was occupied in setting it up, and I was standing on the chain on the port side to feel the weight of it. All of a sudden I felt the chain give away from under me, and I looked back and Dunwoody had disappeared. He fell over back-

wards and I found him on top of the hatch combing and cargo.

Q. Who besides yourself and Mr. Dunwoody, and if anybody, had anything to do with the fastening of this particular deck lashing on No. 1 hatch?

A. Nobody."

Carl Pfautsch, a seaman working on the next hatch, saw nothing of the accident.

Hugo Dallman, the boatswain, testified at page 79, Apostles:

"A. Well, I did not see when it happened (referring to the accident)."

Dunwoody, the libelant, at pages 109 and 110 of the Apostles, testified as follows:

"A. As soon as he (93) told me to set it up, all the men left and went forward of the No. 2 hatch to set up the rest of the lashing. I sat down on the edge of the deckload and started to setting it up.

The COURT. Q. The ends of the lashing came together on the edge of the deckload?

A. Yes, sir, right on the edge of the deckload.

Mr. WALL. Q. How far out did you have to reach from the edge of the deckload to set up the turnbuckle?

A. About two feet, I should say.

Q. All right, now go ahead from that point.

A. The next thing I was down in the hold, and I sung out and the mate asked me if I was hurt, and I told him I was; I told him I thought my leg was broken, and my arm."

This is all of the testimony concerning the happening of the accident. We take it that the libelant must prove the allegations of his libel. The mater-

ial allegations of the libel are found at pages 8 and 9 of the Apostles:

> "Libelant was on said day at work on board of and in the service of said vessel and there engaged on the deckload of said vessel in setting up a turnbuckle in order to tauten the lashings or fastenings of said deckload of said vessel; that while libelant was so engaged, the forelock or pin that secured or held in place the link over the pelican hook of said turnbuckle slipped out and libelant was because of said slipping out of said pin thrown off of said deckload and fell from said deckload through the open hatch of number one hatch of said vessel, a distance of about 17 feet, and in so falling struck with great force and violence upon the boxes under the opening of said hatch and was by so striking injured as aforesaid."

Wherein in the record is it shown or can it even be inferred that this accident was caused by the slipping out of the pin that secured the pelican hook? No one knows how the accident happened except Dunwoody, himself, for no one was looking at him at the time, and Dunwoody prefers to have the court in ignorance of the cause rather than to state it. Even Dunwoody does not attempt to testify that the pin slipped out. What caused this accident is wholly surmise and conjecture so far as the record is concerned. The libelant cannot recover on the doctrine of *res ipsa loquitur,* he must show that this accident was caused by the unseaworthiness of the vessel in accordance with his allegations. This he has failed to do.

But none of the witnesses except Dallman, testify that the nail used in the pelican hook was improper, and even conceding for the purposes of this argument that the pin did slip out as alleged, this under the evidence would not support the decree, as the record shows that a nail was a fit and proper appliance.

Bergsten, the mate, at page 36, testified:

> "Q. What is the usual type of pin which was used to put into that hole, to hold that ring, on the steamship 'Colusa'?
>
> A. A threepenny nail.
>
> Q. Did, or did not, a threepenny nail fit the hole?
>
> Q. State whether or not a threepenny nail would fit this hole?
>
> A. Yes, sir; it would just fit the hole.
>
> Mr. Palmer. Could any larger bolt have been inserted into it? (33)
>
> A. Yes, but not very much larger. We always use a threepenny nail, but there is room to get a little larger pin in, but we always used a threepenny nail.
>
> Q. Did you find any signs of there having been a nail in this hole after the accident?
>
> A. No, sir; after we carried Dunwoody aft, I returned forward to see if anything broke, and I found everything all right except this link was slipped off and the chains disconnected, which couldn't have been disconnected any other way without the link slipping off."

Seaman Carl Pfautsch testified that the nail in the pelican hook was always used. His testimony is at pages 60 and 61 of the record:

> "Q. How did you happen to notice this nail that was put in this pelican hook, in the ring from the pelican hook?

A. How do you mean?

Q. How did you happen to notice that? That was done always, was it not?

A. Yes, that was always done.

Q. How did you happen to notice at this particular time what kind of a nail was used?

A. We used always the same nail.

Q. Did you use the same kind of nail this time?

A. Yes.

Q. Who put it in there?

A. I can't remember that.

Q. How did you notice it was the same kind of a nail that you always used?

A. Well, because we used the same nail—we had to tighten up some more of these turnbuckles, and we used the same kind of nail.

Q. What I want to get at is, did you actually see that nail in the pelican hook, or are you just stating that because you always used it?

A. No, I saw the nail.

Q. How did you happen to see it?

A. Well, because we always used the same kind of nail.

Q. Did you, on this particular occasion, see the kind of nail that was used, or are you just saying that because that was what you always did? Which?

A. Well, I can't say exactly, but I know that was the same kind of nail."

Even this witness Dallman testified that it was regular practice to use the nail in the hole of the pelican hook. His testimony on that subject appears at page 91, Apostles, as follows:

"Why did you say that you put in this particular nail?

A. Because I put it in there.

Q. You remember it, do you?

A. Yes, I do remember it.

Q. The turnbuckle over at hatch No. 2, did you put the nail through there, when you went over to No. 2?

A. I always done that; I had the nails in my pocket, and after we got the turnbuckle on I put the nail in, and I told them to set them tight afterwards, and we went to the next one.

Q. You always put in the nail yourself at each place?

A. I always done that, every time; I had the nails in my pocket and put them in.

Q. You always used the same sized nail?

A. Yes.

Q. You used that same sized nail this time?

A. Yes.

Q. Was it a new nail or an old one?

A. They were new nails."

Dunwoody, the libelant testified that they always used a nail on board the "Colusa" in the pelican hole—that this was regular practice. His testimony is on page 108:

"Q. Over the top of the ring, what was there, if anything, that passed through the pelican hook?

A. A forelock or pin—a nail, in this case.

Q. A forelock, or nail?

A. A nail is what we used on that ship."

Witness J. Cribbin, a man of much nautical experience, testified that nothing else but a pin could be used in the hole, if in fact any was used. He testified on pages 123, 124:

"Q. That is, in your experience with this particular class of turnbuckle, the link will stay there until you knock it off?

A. Yes, with a block of wood, or something; it never slipped off with us. We always have to hit it to get it off.

Q. In the last two years how many occasions have you had of the men under you, to use a turnbuckle in lashing up the deck?

A. That is pretty hard to say. Every ship that comes down from Puget Sound that we handle and that is going to South America, we have to do the same thing.

Q. What is used as a pin to go over that hole in the turnbuckle, usually?

A. We don't use the pin. We tie it up with what we call a rope yarn, or a small marline we tie that up with a rope marline,—that is a small piece of rope; we never use a pin in there; in fact, the only thing that could be used would be a nail.

Q. Do you know what size nail?

A. A three-inch nail." (104)

The witness Stremmel, formerly chief mate, and 19 years a follower of the sea, a man fully familiar with turnbuckles, testified that no pin was necessary. He says at page 132:

"Q. All the turnbuckles, so far as you know, the link was kept on by the strain; is that correct?

A. The link is kept on, the more strain you get on the chain—the tighter you set up the chain, the tighter the link sets onto the hook.

Q. And the turnbuckle that you know of, you didn't use a pin through the top of the link to keep it on; is that right?

A. No, I never saw a pin used yet." (110)

The court conceded that the turnbuckles on the "Colusa" were standard appliances when at page

135 the trial judge, at the conclusion of the case, said:

> "The COURT. I guess there is no question about the fact that these were standard appliances. The only question here is whether this particular one was defective. Your testimony would be cumulative. I have no desire to shut you off from any defense, but you must remember that we run here under high pressure; when a case is set for trial we inquire how long it will take to try it and we try to keep within those limits."

And again at page 136 as follows:

> "The COURT. I understand that your testimony, if produced, would simply be cumulative to that already given, that this was a standard (113) type of turnbuckle in use on the 'Colusa'; but they would not undertake to say anything about the particular turnbuckle in question here."

Thus we are confronted with a situation where it is established to the satisfaction of the court that the appliance used was standard in every respect, and that it was being used as turnbuckles are always used. No defect is shown to exist in the particular appliance, no showing is made as to how or why the accident is caused, no witnesses testify that they saw the accident or know the cause, and still a decree is made against the appellants on the ground that the vessel was unseaworthy.

We challenge counsel to point out in this record any testimony proving or tending to prove that the pin in question slipped out of the pelican hook, we

challenge counsel to point out in this record any testimony showing how this accident happened; we challenge counsel to point out in this record any testimony showing that this appliance was not a standard appliance being used as it was always used; we challenge counsel to point out any testimony proving or tending to prove any unseaworthiness of this vessel, except in the testimony of the witness Dallman, whose deposition was improperly admitted in evidence.

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THE EVIDENCE FAILS TO SHOW IN ANY MANNER HOW THE UNSEAWORTHINESS OF THE "COLUSA" COMPLAINED OF CONTRIBUTED TO THE ACCIDENT.

Under the preceding head we have discussed the allegation of the libel with respect to unseaworthiness. This was the alleged unfitness of a nail to be used as a forelock pin in the pelican hook (Apostles, page 9). We have heretofore reviewed all of the testimony bearing on the actual accident and have shown that its cause is a matter of speculation and conjecture. In this connection we again call to the attention of the court the entire failure upon the part of libelant to show *any connection whatever* between the use of a nail as a pin in the hole of the pelican hook and the happening of the accident. The record being silent as to the casual connection between the use of the nail and the happening of the accident, we submit the decree is unsupported by the evidence.

THE NEGLIGENCE IF ANY WAS THAT OF A FELLOW-SERVANT OF THE LIBELANT.

The judgment of the court is based entirely upon the theory that a nail was used in place of a split pin in the hole of the pelican hook, and that the negligence consisted of the boatswain placing this nail in the hole. To avoid the effect of having the actionable negligence that of a fellow-servant, thus precluding a recovery, the libelant attempted to show that the boatswain was "a seaman in command" and thus under the Act of March 4, 1915, known as the Seaman's Act, he was not a fellow-servant of libelant. The court so held, but we think against the weight of evidence, for the mate and not the boatswain was in command of this work.

For the purposes of this discussion, and for this purpose alone, we must consider the deposition of Dallman properly before the court, as without this testimony no negligence is shown, and the libelant's case must fall.

The mate Bergsten swears that he was in charge of the work in question. He testified at page 29:

> "Dunwoody was setting up this chain lashing *under my direction there*—I was standing on the chain on the port side, he was behind me about 15 feet. * * *
>
> Q. Who, besides yourself, and Mr. Dunwoody, and if anybody, had anything to do with the fastening of this particular deck lashing on No. 1 hatch?
>
> A. Nobody.
>
> Q. Then as I understand your testimony, all of the work in connection with putting this

deck lashing in place was done by yourself and Mr. Dunwoody.

A. Yes, by myself and Mr. Dunwoody."

Now Dallman and Dunwoody attempted to make it appear that the work of lashing the deckload was in charge of the former, as boatswain, and thus reap the benefit of the Act of 1915 referred to above, but as shown by Dallman's own testimony, he was at the time under the direction and control of the mate, and the *mate, not the boatswain* was the "seaman having command".

Dallman says in regard to his work, page 77:

"Q. What are the duties of a boatswain aboard vessels plying out of San Francisco and Pacific Coast ports?

A. To take charge of the deck work as directed by the mate."

Again at page 86:

"A. Well, I don't see how you mean that; I had to do as I got told; I am not responsible.

Q. You are not responsible?

A. When I am boatswain of the ship and the mate says, 'You do that', that is the way it is done."

Thus it can be readily seen that the work was actually in charge of the mate; the mate was present in person and had charge and command of the work. As a consequence the boatswain could not be the "seaman in command".

By "seaman having command" is meant a seaman having some charge over the navigation of the

vessel, in which class the boatswain does not fall. If he was not the "seaman having command", the negligent acts found by the trial court to have been performed by him were not actionable, as he was the fellow-servant of the libelant.

So far as a thorough examination of the authorities discerns, no construction has ever been placed by the courts upon the words "Seaman having command", except *In re Tonowanda Iron & Steel Company,* 234 Fed. 198. In that case the court holds that the new Seaman's Act of March 4, 1915, creates a new liability on ship owners, making them responsible for the negligent acts of the officers charged with the responsibilities of the navigation of the vessel. Prior to the passage of the act, all seamen on board a vessel, with the possible exception of the captain, were fellow-servants engaged in a common purpose of navigating the vessel. Following the passage of the act in question, those officers *charged with the responsibilities of navigation of the vessel* were taken out of the class of fellow-servants, and the *Tonowanda Iron & Steel Company case* (supra) so holds, for in that case it is said at pages 201, 202:

> "So, also, in the case at bar the Seaman's Act made a substantive change in the maritime law of the land creating a new liability—not simply changing methods of procedure or rules of evidence or affecting the statute of limitation—and making the ship or her owner answerable for the negligence of the officers

> charged with the responsibility of her navigation, as a result of which a seaman sustains injuries."

Who are the seamen in command, or in other words, who are the officers charged with the responsibility of the navigation of the ship? It would seem clear that an injury caused by a fellow-servant not responsible for the navigation of the vessel is not covered by this statute.

Section 4612 of the Revised Statutes provides that:

> "Every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same, shall be deemed and taken to be a seaman."

It would seem that all such persons cannot be said to be seamen in command. Seamen, therefore, other than those in command or responsible for the navigation of the vessel, although they may have a petty command over subordinates would not be called seamen in command. So far as these seamen are concerned, it would seem that the same fellow-servant rule would still apply and could be invoked as a legitimate defense in an action brought by an injured seaman for injuries caused by the negligence of such co-employees or seamen.

In this case the court found, page 140, Apostles, that any actionable negligence was that of the boatswain, and holds that he was a "seaman having command". This finding is not supported by the evidence, for as we have shown, the mate and

not Dallman was in actual command, but in addition to this we have the authority of the *Tonowanda case,* supra, to the effect that "seamen having command", refers to officers "charged with the responsibility of the navigation of the vessel". It will not be attempted to be shown by the appellee that a boatswain ever was an officer under this classification, he is not a licensed officer.

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THE LIBELANT ASSUMED THE RISK OF THIS INJURY.

In this case the libelant was provided with a standard turnbuckle not shown to have been defective. He had used the same type of appliance on board this vessel many times before. All that he has shown is that the turnbuckle flew open. The record is silent as to why this happened. The mere opening of the turnbuckle does not make out a cause of action, its opening must be shown to be because of some unseaworthy condition of the appliance. As to risks of injury not caused by some unseaworthy condition of the ship's furnishings, no liability rests on the owner or the vessel, and they are assumed by the seaman.

The doctrine of assumption of risk is applied in Admiralty as well as in other branches of jurisprudence, notwithstanding the rule that damages will, in some cases of concurrent negligence, be divided.

*Scandanavia,* 156 Fed. 403.

The libelant, a fireman employed upon the claimant's vessel, was injured as a result of a fall which occurred while he was climbing a ladder upon the vessel. The ladder was defective at one end. The libelant knew the condition of this ladder as he had often had occasion to use it in the performance of his duties. The court, in holding that the libelant had assumed the risk which caused his injury, said:

> "In speaking for the Circuit Court (28 Fed. 881) Judge Wallace pointed out that although, in cases of marine torts, admiralty courts are in the habit of proceeding upon enlarged principles of justice and equity, still this does not imply 'that such courts do not proceed upon settled rules equally with courts of equity or of common law'. The language of the decision shows that the court did not intend to ignore the recognized features of the law of negligence, nor to disregard the accepted doctrine of the assumption of risk. Such intention is not shown in the decisions of the higher federal courts. In the Dredge Case, 134 Fed. 161, the Circuit Court of Appeals in this circuit, did not intimate that the principles pertaining to assumption of risk and other well-recognized principles of the law of negligence are to be overridden in a court of admiralty.
>
> In the Saratoga, 87 Fed. 349, the District Court divided the damages on the ground that the servant's injury was due to the combined and concurrent negligence of himself and the ship. This decision was reversed by the Circuit Court of Appeals in 94 Fed. 221, where, in speaking for that court, Judge Lacombe held that the libelant had a complete knowledge of the hatches which were alleged to have been defective, and that he must be held to have taken the risk. The court said:

'With the knowledge of this condition of things the libelant must be held charged * * * The libelant must be held to a knowledge of the conditions under which the work was done, since it had been done in the same way repeatedly and usually during his employment.'

In the Serapis, 49 Fed. 393, the District Court held it to be a case of concurrent faults, and divided the damages; but in 51 Fed. 92, the Circuit Court of Appeals reversed the District Court, and held that the owners of the steamship could not be held negligent for having on board the ship a winch which had been there for over six years in continual use, but requiring more care on the part of the person who worked it than some modern machines. The case showed that the machine was well known to the employee, and that it was well known to him that it required more attention on his part than other machines fitted for similar use. The court held that the libelant assumed the risks of all accidents.

In the Maharajah, 40 Fed. 784, Judge Brown held that: 'A workman employed to work a particular machine, which he fully understands, takes the risk of accidents that may happen to him while using it, so long as the machine is maintained in the same condition as by his contract he has the right to expect and to rely upon.'

In the Henry B. Fiske, 141 Fed. 188, a case where a defective patent rider broke, such rider forming part of the tackle, apparel, and furniture of a schooner, it was held that, if no sufficient reason appears why the breaking of the rider should have been anticipated, such danger as lay in the possibility of its breaking was a risk assumed by the libelant, a seaman on the vessel, as incident to his employment. The court says:

'Damages are claimed by reason of the alleged unsound and defective condition of the rider which broke. No evidence was offered to prove that the rider was unsound or defective beyond the fact that it broke. *Unless the owners or master were negligent in regard to the condition of the rider, neither they nor the vessel are liable for the injury to the libelant caused by its breaking.*

As regards the crew employed on board the vessel, there is no warranty on her part that none of her fittings or appliances shall, at any time, give way, to their injury. Liability on her part, in a case of an accident of this kind, is incurred only when those who represent her have failed to exercise reasonable care to make the fittings or appliances safe and arising out of such defects as reasonable care on their part would have discovered and remedied. If no sufficient reason appears why the breaking of the rider should have been anticipated, such danger as lay in the possibility of its breaking was a risk assumed by the libelant as incident to his employment.' ''

See also the *Karl,* 18 Fed. 655; also the *Luckenbach,* 53 Fed. 662; also a *Corpus Juris.,* page 13,127; also the *Concord,* 58 Fed. 913; also *Oregon Lumber Company v. Portland Steamship Company,* 162 Fed. 912.

If the accident happened by reason of the pin falling out of the pelican hook, this was a risk assumed by Dunwoody, for it was an injury caused by the improper manner in which the work was being carried on. The appliance was in full view and immediately in front of Dunwoody for he says he saw the nail in the hole.

"Q. With reference to setting up this turnbuckle, when you started with your stillson wrench to screw up the turnbuckle did you look to see whether or not the pin had been inserted in the pelican hook?

A. I did.

Q. And what did you see?

A. I saw a nail.

Q. What kind of a nail did you see?

A. A nail about three inches long, I should say, or two and a half inches."

If the nail did in fact fall out, it was the action of Dunwoody in improperly turning the appliance that caused it thus to fall. He must assume the risks of his own carelessness, unconnected with any unseaworthiness of the vessel.

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### IN CONCLUSION.

The trial court has based its finding in this case wholly on the evidence contained in the deposition of the Boatswain Dallman. Dallman, as the record shows, had left the ship and had a suit pending against the captain for his wages (pages 87, 88). It is from his testimony, and his alone, that the court found that a split pin was a necessary appliance to be used with this pelican hook. Without Dallman's deposition the decision and its resultant decree cannot stand, and we feel confident in our position that the deposition was inadmissible. No other witness so much as refers to a split pin.

Even with Dallman's deposition in the record, no negligence upon the part of the appellants is shown.

The appliance was standard in every respect. This court is as able to judge the Dallman deposition as was the trial court. The impossibility of using a split pin in the pelican hook is apparent for the very purpose of the turnbuckle is to lash the deck-load fast, but in such a manner that it can be readily slipped in case of high seas or danger. With a split pin this could not be done, and grave danger to the ship would result.

No showing is made how or why the accident occurred. Until this is done no decree can lie, because risks other than those caused by defective equipment were assumed by Dunwoody.

If the court should, in the face of the statute and the decided case, decide that Dallman's deposition was properly admitted, then, too, the decree must fall, for the theory of the decision of the court below is that the negligence was that of the boatswain, and he is not a licensed officer charged with the responsibility of the navigation of the vessel.

It is earnestly urged that the decree of the court below be reversed.

Dated, San Francisco,
October 8, 1917.

GOODFELLOW, EELLS, MOORE & ORRICK,
*Proctors for Appellants.*